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No. 85-853 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1985

RAY MCLAIN, Sheriff of Lincoln County, Oklahoma,
Petitioner,

VS.

EDWARD JOHN WALKER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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December, 1985

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QUESTIONS PRESENTED BY PETITIONER FOR REVIEW

1. Whether the Sixth Amendment to the United States Constitution requires the appointment of counsel to indigent defendants who have been cited for contempt in a civil contempt proceeding brought by a private party to enforce a child support obligation.

2. Whether the Fourteenth Amendment of the United States Constitution requires the appointment of counsel to indigent defendants in the above mentioned situation.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The May 23, 1984 opinion and order of the district court is unreported, but appears in the petition for certiorari as Appendix B. The Tenth Circuit's opinion, styled Edward John Walker vs. Ray McLain, Sheriff of Lincoln County, Oklahoma, was filed on July 25, 1985 and is published at 768 F.2d 1181 (10th Cir. 1985), and appears in the Supplemental Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The material facts are not in dispute. After a divorce from his wife, respondent was effectively ordered to pay $500 per month in child support. Of this amount, $120 represented payments to be made out of respondent's income, and $380 represented the children's share of respondent's social security benefits based upon his disabling condition of advanced degenerative heart disease. The wife has received the $380 each month, but respondent has not paid the $120 per month additional support obligation. Respondent claims that he is unable to meet this obligation due to his indigency.

On September 7, 1983, respondent was tried and found guilty of contempt for wilful failure to pay support, but was not incarcerated at that time. Thereafter, on February 15, 1984, respondent was again found guilty of contempt for nonsupport. Based upon both the September 7, 1983 and February 15, 1984 contempt orders, respondent was sentenced to ninety days in the county jail, or until he paid a lump sum of $1000 to purge the contempt. Respondent began serving his sentence on February 17, 1984.

Respondent was not represented by counsel at either contempt hearing. It is undisputed that the state trial court did not advise respondent of any right to the appointment of counsel at either hearing, nor was counsel appointed. It is also undisputed that the state trial court never made any inquiry into respondent's financial ability to employ counsel, even though respondent expressly claimed an inability to afford an attorney.

On March 27, 1984, respondent sought habeas corpus in the Oklahoma Supreme Court, claiming *inter alia* that he had been denied due process of law by the trial court's failure to advise him of his right to appointed counsel at the contempt hearings. The Oklahoma Supreme Court denied habeas corpus without a full development of respondent's constitutional claim.

On March 29, 1984, respondent commenced this action for habeas corpus in the district court claiming that his imprisonment was illegal because the state trial court had failed to advise him of his right to appointed counsel, and had failed to appoint counsel to represent him. Following the submission of authorities, the available state court record and a deposition of the state court judge, the district court entered an order on May 23, 1984 denying the habeas corpus petition.

Respondent filed a motion to alter or amend judgment on May 31, 1984, and the motion was denied by the district court on June 13, 1984. Respondent then filed his notice of appeal on June 21, 1984. Upon respondent's application, the district court issued a certificate of probable cause for appeal on August 6, 1984.

The cause was argued in the Court of Appeals for the Tenth Circuit on April 19, 1985. On July 25, 1985, the Court of Appeals issued its order reversing the judgment of the district court, and holding that due process compels the appointment of counsel, and advice as to the availability thereof, for an indigent defendant threatened with incarceration in a civil contempt proceeding for nonsupport. Petitioner now seeks review of this order by writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Questions Presented For Review Are Likely to Become Moot During The Pendency Of This Appeal.

The Court of Appeals correctly found that respondent's constitutional claim was not moot, even though he had been released from jail,[1] because there was a reasonable expectation that the challenged conduct was capable of repetition, yet evading review. *Walker* v. *McLain*, 768 F.2d 1181, 1182 (10th Cir. 1985). *See Weinstein* v. *Bradford*, 423 U.S. 147 (1975); *Rex* v. *Owens*, 585 F.2d 432 (10th Cir. 1978). The Court of Appeals also noted the possibility of collateral consequences flowing from respondent's contempt conviction. *Walker* v. *McLain*, 768 F.2d at 1183. *See Sibron* v. *New York*, 392 U.S. 40 (1968). Under Oklahoma law, for example, the still valid contempt order could be used to affect respondent's rights in subsequent custody, visitation or support proceedings. *See, e.g., Pirrong* v. *Pirrong*, 552 P.2d 383 (Okla. 1976).

The finding of the Court of Appeals that this case was not moot, however, implicitly depended upon the existence of a crucial underlying fact, viz., the minority of respondent's children.[2] This is so because, under Oklahoma law, a child support order may not be enforced by contempt

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[1] Even though respondent had been released from his imprisonment, habeas corpus was still an available remedy because 28 U.S.C. §2254 "does not limit the relief that may be granted to discharge . . . from physical custody." *Carafas* v. *LaVallee*, 391 U.S. 234, 239 (1968).

[2] Children attain majority in Oklahoma at the age of eighteen. *See* 15 O.S. 1981 §13. *See also* 10 O.S. 1981 §§91 and 1101.

once the minor children of the parties have attained majority. *Potter* v. *Wilson*, 609 P.2d 1278, 1281 (Okla. 1980). Thus, the future prospect of repeated contempt prosecutions against respondent is limited in time by his children's attainment of majority. Similarly, the collateral consequences of the contempt conviction upon the issues of custody and visitation will also cease to exist upon the majority of respondent's children.

The state court record does not reveal the birthdates of respondent's children. The record merely reflects that the children were aged fifteen and thirteen at the time the divorce petition was filed on May 28, 1982. At a minimum then, the older child has already attained majority, while the younger child is anywhere from sixteen and a half to seventeen and a half years of age.

Given the mechanics of the appellate process in this Court on certiorari, it is extraordinarily unlikely that this case could be argued before the October, 1986 term. Even assuming a relatively speedy grant of certiorari, the briefing cycle could not be completed in time for the case to be argued during the October, 1985 term of Court. *See* Rule 35, Supreme Court Rules. Thus, there is a realistic probability that both of respondent's children will have attained majority by the time this case is argued and decided, thereby mooting the federal constitutional question. In the interest of judicial economy, this Court should not waste its resources and the resources of the parties where the likelihood of mootness exists. Accordingly, certiorari should be denied.

II.

The Question Of Whether The Sixth Amendment Requires The Appointment Of Counsel For Indigent Civil Contempt Defendants Is Not Properly Before This Court.

Petitioner seeks certiorari to have this Court review the question of whether the Sixth Amendment compels the appointment of counsel for an indigent defendant threatened with incarceration in a civil contempt action for non-support.[3] Respondent asserts that this issue is not properly before the Court.

It is true that the Sixth Amendment issue was marginally addressed by the district court, and was presented *by petitioner* to the Court of Appeals. *See* Appendix B to Petition at 10b-11b (district court's discussion limited to analysis of New Mexico Supreme Court case). Respondent, however, expressly conceded for the purposes of his appeal that he possessed no Sixth Amendment right to appointed counsel. Reply Brief of Appellant at 2 n.1. *But see Ridgeway* v. *Baker*, 720 F.2d 1409 (5th Cir. 1983). As a result, the Tenth Circuit neither discussed nor ruled upon the Sixth Amendment question petitioner has presented for review. Since the Sixth Amendment question was not fully aired or developed in the Court of Appeals, it is not ripe for review by this Court. *See Hormel* v. *Helvering*, 312 U.S. 552 (1941); *St. Louis DDTC Parents' Assoc.* v. *Mallory*, 767 F.2d 518, 520-21 (8th Cir. 1985).

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[3] Although petitioner failed to include the factor of threatened incarceration in the questions presented for review, respondent assumes that petitioner intended to include that factor since it is the crucial element triggering the right to counsel. *See Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981).

Respondent's concession on the Sixth Amendment issue in the Court of Appeals effectively made the petitioner the prevailing party on this question. Approval of a petition for certiorari brought by a prevailing party would be inconsistent with this Court's settled refusal to entertain appeals by parties who have obtained favorable results in the lower courts. *See, e.g., Perez* v. *Ledesma*, 401 U.S. 82, 87 n.3 (1971). Respondent therefore contends that the only question properly before this Court on certiorari is whether the Due Process Clause of the Fourteenth Amendment requires the appointment of counsel for an indigent defendant threatened with incarceration in a civil contempt action for nonsupport.

III.

An Indigent Defendant Threatened With Incarceration In A Civil Contempt Action For Nonsupport Is Entitled To The Appointment Of Counsel Under The Due Process Clause Of The Fourteenth Amendment.

Petitioner also seeks certiorari to challenge the Tenth Circuit's holding that indigent defendants threatened with imprisonment in a civil contempt action for nonsupport enjoy the right to appointed counsel. This right necessarily imposes the concomitant obligation to inform defendants of the availability of appointed counsel if they are indigent. *Walker* v. *McLain*, 768 F.2d at 1185. *See In re Gault*, 387 U.S. 1, 41-42 (1967); *Miranda* v. *Arizona*, 384 U.S. 436, 473 (1966). The resolution of this question must be undertaken in light of this Court's decisions and the decisions of the lower courts concerning the right to counsel.

A. The Decision Of The Tenth Circuit Is In Harmony With The Decisions Of All Other Courts Of Appeals That Have Considered The Question.

Among the inquiries to be made on a petition for certiorari is whether there is a conflict among the circuits on the same matter. Rule 17.1(a), Supreme Court Rules. In addition to the Tenth Circuit, three other Courts of Appeals have considered the indigent's right to appointed counsel in a civil contempt proceeding for nonsupport.[4] *Sevier* v. *Turner*, 742 F.2d 262 (6th Cir. 1984); *Ridgeway* v. *Baker*, 720 F.2d 1409 (5th Cir. 1983); *Henkel* v. *Bradsaw*, 483 F.2d 1386 (9th Cir. 1973). Each of these cases have stated a conclusion in harmony with the decision of the Tenth Circuit. Thus, it is not surprising that petitioner has failed to address the inquiry of a conflict among the circuits on the question presented for review.[5]

In *Henkel*, an indigent contemnor who had been denied appointed counsel in a civil nonsupport proceeding brought a civil rights action in which the district court declared

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[4] Petitioner's assertion that "[t]he only authority cited by respondent for extending [the] right to court-appointed counsel to civil cases of this type are two Federal District Court cases arising out of Ohio . . . as well as a later Federal District Court case out of Michigan, . . ." is patently false. Petition at 9. All relevant authority cited herein was presented by respondent to the Tenth Circuit.

[5] Under Rule 17.1(a), Supreme Court Rules, a further consideration is whether the Court of Appeals decision is in conflict with the decision of the state court of last resort. The Tenth Circuit's decision cannot be said to be in conflict with the decision of the Oklahoma Supreme Court, because the Oklahoma Court did not directly address or fully develop the merits of respondent's constitutional claim. *See* Appendix A to Petition.

that the indigent was entitled to appointed counsel if imprisonment might be the result of the contempt proceeding. While the Ninth Circuit reversed on the basis of *Younger* abstention principles, the Court of Appeals nevertheless commented:

> [W]e share the District Court's view that Henkel, absent the representation of counsel, could not be sentenced to jail in the contempt proceedings.
>
> * * *
>
> The state trial judge, now cognizant of *Argersinger*, will most assuredly know that if a lawyer is not appointed for Henkel's representation, Henkel cannot be confined even if found to have been contemptuous.

483 F.2d at 1388-89.

Electing to proceed by habeas corpus, the indigent petitioner in *Ridgeway* successfully argued that he was constitutionally entitled to appointed counsel where imprisonment may result from a civil contempt proceeding for nonsupport. Noting that "[t]he right to counsel turns upon whether deprivation of liberty may result from a proceeding, not upon its characterization as 'criminal' or 'civil'," the Fifth Circuit concluded that "[i]f . . . imprisonment, by whatever process it is adjudicated, is the possible result of a proceeding, the defendant who is threatened with jail has the right to a lawyer." 720 F.2d at 1413, 1415. Likewise, on habeas corpus in *Sevier*, the Sixth Circuit had no difficulty concluding that "[s]ince Sevier was incarcerated for sixteen days as a result of the civil contempt hearing, he was entitled to have the assistance of counsel during that proceeding [citations omitted]." 742 F.2d at 267.

In contexts other than nonsupport proceedings, the Courts of Appeals are equally unanimous in concluding that

indigent civil contemnors are constitutionally entitled to appointed counsel when subjected to imprisonment. *See, e.g., United States* v. *Bobart Travel Agency*, 699 F.2d 618 (2d Cir. 1983) (failure to produce records under IRS summons); *United States* v. *Anderson*, 553 F.2d 1154 (8th Cir. 1977) (failure to produce records); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973) (refusal to testify before grand jury). *See also In re DiBella*, 518 F.2d 1154 (2d Cir. 1975). These cases are not dissimilar from the civil contempt action for nonsupport in that in each instance the contemnor purportedly has the ability to free himself from imprisonment simply by complying with the court order.[6] There is thus no conflict whatsoever among the circuits on either the question presented for review or on related questions. This unanimity among the circuits militates strongly against the grant of certiorari in this case.[7]

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[6] The indigent defendant in a nonsupport action, however, faces a difficult Gordian Knot. Since compliance with the court order in a nonsupport action involves the payment of money, the indigent defendant's ability to free himself from imprisonment is merely illusory. *Walker* v. *McLain*, 768 F.2d at 1184; *Ridgeway* v. *Baker*, 720 F.2d at 1413-14; *McNabb* v. *Osmundson*, 315 N.W.2d 9, 11 (Iowa 1982).

[7] The federal district courts are likewise unanimous in finding a due process right to appointed counsel for the indigent defendant in a civil contempt action for nonsupport *Johnson* v. *Zurz*, 596 F.Supp. 39 (N.D. Ohio 1984); *Lake* v. *Speziale*, 580 F.Supp. 1318 (D. Conn. 1984); *Cobb* v. *Green*, 574 F.Supp. 256 (W.D. Mich. 1983); *Mastin* v. *Fellerhoff*, 526 F.Supp. 969 (S.D. Ohio 1981); *Young* v. *Whitworth*, 522 F.Supp. 759 (S.D. Ohio 1981).

B. The Decision Of The Tenth Circuit Is Consistent With The Applicable Decisions Of The United States Supreme Court.

In the landmark decision of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court held that the Sixth Amendment's guarantee of the assistance of counsel was applicable to the states as a matter of due process of law, and accordingly concluded that the indigent felony defendant was entitled to appointed counsel. This rule was extended to encompass all criminal prosecutions wherein the accused is subjected to imprisonment in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). The cutting edge for this expanded right to counsel was whether "an accused is deprived of his liberty," and not whether the offense be characterized as petty or serious. 407 U.S. at 32.

While *Gideon* and *Argersinger* dealt primarily with the Sixth Amendment, this Court has also had occasion to address the question of whether the due process concept of fundamental fairness required the appointment of counsel for an indigent child in a juvenile delinquency proceeding. *In re Gault*, 387 U.S. 1 (1967). In the historically *civil* delinquency proceeding, this Court eschewed the civil label of convenience and held that:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed*, the child and his parents must be notified . . . [that] if they are unable to afford counsel, that counsel will be appointed to represent the child.

387 U.S. at 41 [Emphasis supplied].

In terms of the indigent defendant's right to appointed counsel, then, these cases reflect the Court's increasing concern and emphasis on the outcome of a proceeding, viz., loss of physical liberty, rather than on the label attached to it as civil or criminal. Wherever the outcome results in a loss of physical liberty, the trend is to impose the right to counsel. *See Vitek* v. *Jones*, 445 U.S. 480, 496-97 (1980) (plurality opinion).

This Court's emphasis on the outcome of a proceeding in defining the right to counsel has most recently been reiterated in *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981). In *Lassiter*, this Court was called upon to determine whether the Due Process Clause compelled the appointment of counsel in a civil action for an indigent who, while threatened with the loss of a fundamental liberty, viz., parental rights, was not directly confronted with the loss of physical liberty. Proceeding from "[t]he preeminent generalization that . . . an indigent's right to appointed counsel . . . has been recognized to exist only where the litigant may lose his physical liberty, . . ." this Court held that when personal freedom is not at stake the right to counsel must be determined on a case-by-case basis employing a two part due process balancing test. *Lassiter*, 452 U.S. at 25.

This test first involves a balancing of the three elements to be evaluated in deciding what process is due, as outlined in *Matthews* v. *Eldridge*, 424 U.S. 319 (1976).[8]

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[8] These elements are: (1) the private interests at stake; (2) the risk that the procedures employed will lead to error, and the probable value of additional safeguards; and (3) the government's interest, including the fiscal and administrative burden the additional safeguards would impose.

Then, the "net weight" of these *Eldridge* factors must be set "in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Lassiter*, 452 U.S. at 27.

In adopting this case-by-case balancing test, however, this Court did not retreat from, but rather reinforced, its emphasis on the loss of physical liberty in defining the right to counsel:

> [I]t is the *defendant's interest in personal freedom*, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel. . . .

Lassiter, 452 U.S. at 25 [Emphasis supplied]. Clearly then, when personal freedom hangs in the balance, the *Lassiter* presumption against the appointment of counsel is inapplicable, irrespective of the civil nature of the nonsupport contempt proceeding.[9] *Walker* v. *McLain*, 768 F.2d at 1183 n.1.

Looking to the *Eldridge* factors in the context of the civil contempt proceeding for nonsupport, there is no dispute that the government possesses strong interests in seeing that minor children are supported and in preserving the enforceability of its judicial decrees. Significantly, however, "[t]hese interests will not be hindered by the re-

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[9] Respondent had argued in the Court of Appeals that where unfettered personal freedom was at stake, a court need not employ the *Eldridge* factors in evaluating the right to counsel, because the right was absolute. *See Lake* v. *Speziale*, 580 F.Supp. at 1339; *Mastin* v. *Fellerhoff*, 526 F. Supp. at 973. The Tenth Circuit disagreed, and held that the *Eldridge* factors should be applied as in any other claim to due process of law. *Walker* v. *McLain*, 768 F.2d at 1183 n.1.

quirement [of appointed counsel]." *Young* v. *Whitworth*, 522 F.Supp. at 763. *Accord*, *Walker* v. *McLain*, 768 F.2d at 1184. Thus, only the government's fiscal interest is implicated in the *Eldridge* equation.

Petitioner asserts that the risk of error in a nonsupport proceeding is low because such a proceeding "is normally a simple bookkeeping matter. . . ." Petition at 14. Such an assertion, however, presents an unduly simplistic view of whether the failure to pay support was wilful. To be sure, wilfulness in the context of a nonsupport proceeding is a legal term of art — it does not possess the same meaning as its common usage in the English language. The factual and legal issues which permeate virtually every nonsupport proceeding involving an indigent defendant are clearly beyond the ken of the indigent unrepresented layman, who is often uneducated or illiterate. Accordingly, the Tenth Circuit correctly concluded that "[t]he issues in a proceeding for wilful nonsupport are not so straightforward that counsel will not be of assistance in insuring the accuracy and fairness of the proceeding." *Walker* v. *McLain*, 768 F.2d at 1184. *Accord*, *Ridgeway* v. *Baker*, 720 F.2d at 1414.

The *Eldridge* risk factor cannot be viewed as a static concept. As a defendant's interest in the outcome of a proceeding increases, the degree of potential for error necessary to trigger the claimed safeguard becomes correspondingly less. What is at stake is the integrity of the fact-finding process. When that process may lead to imprisonment, this Court for more than fifty years has spoken with virtually one voice about the heightened need for counsel to preserve the integrity of that process. *See Powell* v. *Alabama*, 287

U.S. 45, 69 (1932). Thus, when the interest at stake is personal freedom, "even a modest reduction in the potential for error in the deprivation of that interest justifies the imposition of appointed counsel." *Young* v. *Whitworth*, 522 F.Supp. at 763.

The final *Eldridge* factor to be evaluated is the private interest at stake. It is beyond cavil that "[t]he [respondent's] interest in this case is one of the most important protected by our constitution — the interest in personal liberty." *Walker* v. *McLain*, 768 F.2d at 1183. Petitioner, however, seeks to denigrate the indigent contemnor's liberty interest in personal freedom by asserting that respondent enjoyed only conditional liberty, and therefore his situation is akin to the probationer or parolee in a revocation proceeding. *See Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). This argument rests on the oft-quoted cliché that the civil contemnor "has the keys to his own prison" and may avoid incarceration simply by complying with the support order or proving his inability to do so.[10] Appendix B to Petition at 12b. Petitioner's analysis, however, is specious.

As the Court of Appeals correctly concluded, respondent's liberty interest cannot be viewed as conditional, for "[i]f [respondent] is truly indigent, his liberty interest is

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[10] It is of no moment that the *pro se* indigent may attempt to prove at trial that his failure to pay support was not wilful, and thus avoid incarceration. One's *present* ability to afford counsel may bear little relationship to one's *past* ability to make support payments, which is the factual inquiry at the contempt hearing. *See Cobb* v. *Green*, 574 F.Supp. at 262. Moreover, as noted in the discussion of the *Eldridge* risk factor, *supra*, the integrity of the fact-finding process is impugned in the absence of counsel.

no more conditional than if he were serving a criminal sentence; he does not have the keys to the prison door if he cannot afford the price." *Walker* v. *McLain*, 768 F.2d at 1184. *Accord, Ridgeway* v. *Baker*, 720 F.2d at 1413-14; *McNabb* v. *Osmundson*, 315 N.W.2d at 9.

Petitioner's reliance on *Gagnon* and *Morrissey* to confer no more than conditional liberty upon the respondent is likewise flawed in that the posture of the civil contemnor is distinctly different from that of the probationer and parolee. Both the probationer and parolee have had judgment and sentence imposed. Thus, unlike respondent, they have already had a trial at which *they enjoyed the assistance of counsel to preserve the integrity of the fact-finding process.*[11]

Clearly, one in respondent's position enjoys "the absolute liberty to which every citizen is entitled, . . ." *Gagnon* v. *Scarpelli*, 411 U.S. at 781. Giving respondent's liberty interest in personal freedom the "extreme weight" it is due radically alters the *Eldridge* equation employed by the district court and argued by petitioner. *Young* v. *Whitworth*, 552 F.Supp. at 763. Indeed, in balancing the *Eldridge* factors, the Tenth Circuit properly concluded that:

> While the state does have an interest in minimizing the cost of [nonsupport] proceedings, this interest in

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[11] *Gagnon* and *Morrissey* are also distinguishable in that revocation proceedings are historically informal with an eye toward rehabilitation of the offender. *See Ridgeway* v. *Baker*, 720 F.2d at 1413 n.4. On the other hand, a civil contempt proceeding is cloaked with many of the formalities of a criminal prosecution. *See* 21 O.S. 1981 §1981. *See also Whillock* v. *Whillock*, 550 P.2d 558 (Okla. 1976) (proof by clear and convincing evidence required).

> monetary savings cannot outweigh the strong private interest of the [respondent] and the substantial procedural fairness achieved by providing a lawyer for the indigent defendant in a civil contempt proceeding [citations omitted].

768 F.2d at 1184.

It is thus evident that the Tenth Circuit evaluated the *Eldridge* factors in a fashion entirely consistent with the decisions of this Court regarding the right to counsel, beginning with *Powell* and culminating in *Lassiter*. Certiorari, therefore, should be denied. *See* Rule 17.1(c), Supreme Court Rules.

IV.

The Questions Of Whether Respondent Was Indigent And Whether His Failure To Pay Support Was Contemptuous Are Not Material To The Determination Of Certiorari.

Although not specifically raised as questions for review, petitioner has injected the issues of respondent's indigency and the factual merits of the state court contempt hearings. In so doing, petitioner has not made a fair presentation of the facts. These issues serve only to obfuscate the proper inquiries as to whether certiorari should be granted. *See* Rule 17, Supreme Court Rules. Indeed, the district court properly noted that these issues were outside the scope of a federal court's inquiry on habeas corpus:

> It is not this court's function to determine whether the original support order should be modified or to determine whether [respondent] is indigent, or to determine [respondent's] present ability to comply with the support order . . . This court's function in this action is solely to determine whether [respondent]

> is being held in custody in violation of the Constitution, laws or treaties of the United States.

Appendix B to Petition at 14b. It is not the merits of the state court contempt actions that respondent challenged; rather, he attacked the process by which those issues were adjudicated. Certainly, a court does not consider one's guilt or innocence in appointing counsel in a criminal prosecution.

Similarly, the issue of respondent's indigency cannot now be considered in deciding whether to grant certiorari. Respondent was not denied counsel for lack of proof of his indigency. Rather, the state court judge did not advise the respondent of any right to appointed counsel based upon that court's view that no such right existed in the law. *See* Appendix B to Petition at 4b. Thus, even if respondent had affirmatively demonstrated his inability to afford counsel, none would have been appointed. Having imprisoned Mr. Walker for ninety days, "the state cannot now be heard to assert an entirely different reason for denying [Walker] counsel." *Ridgeway* v. *Baker*, 720 F.2d at 1412.

Moreover, respondent claimed not only a right to appointed counsel, but also the right to be advised of the availability of appointed counsel, if indigent. This latter right exists quite independently of respondent's claimed indigency. The state trial judge obviously "could not know whether [Mr. Walker] was indigent unless [he] inquired about the matter." *Sevier* v. *Turner*, 742 F.2d at 266 n.4. It is undisputed that the state court judge made no inquiry into respondent's indigency vis-a-vis his ability to employ counsel.

The Court of Appeals, therefore, properly rejected petitioner's argument that the case should be remanded for a determination of respondent's indigency. *Walker* v. *McLain*, 768 F.2d at 1185. *See Miranda* v. *Arizona*, 384 U.S. at 473 n.43. This Court should likewise reject this argument in deciding whether to grant certiorari.

CONCLUSION

The petition presents no issue warranting review by this Court. Respondent, therefore, respectfully prays that this Court deny the petition for certiorari.

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December, 1985

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the Respondent's Brief in Opposition were mailed this ..... day of December, 1985, postage prepaid, to: S. Paul Richards, Assistant District Attorney, Pottawatomie County Courthouse, Shawnee, Oklahoma 74801.

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Steven A. Novick